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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Procedures for Reviewing Requests	)	WT Docket No. 97-197
For Relief From State and Local	)	97-192
Regulations Pursuant to Section	)	
332(c)(7)(B)(v) of the	)	
Communications Act of 1934	)	

COMMENTS OF GTE SERVICE CORPORATION

GTE Service Corporation and its telephone and wireless companies

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SUMMARY

GTE supports the FCC efforts to establish a clear set of procedures for entities to follow in requesting relief from state and local facilities siting regulations based on RF concerns. GTE supports the FCC's proposed definition of final action. GTE also generally supports the Commission's proposal to determine whether a state or local authority has failed to act on a case-by-case basis. GTE believes, however, that the FCC can and should use the record in this proceeding to develop guidelines that require states and localities to complete the approval or rejection process entirely within 6 months or risk FCC intervention and preemption.

GTE asks the FCC to establish a clear policy that wireless facilities site actions will be reviewed based not only on the stated grounds for the action, but on the underlying public record – particularly where that record shows substantial opposition based on RF concerns.

GTE strongly objects to the Commissions proposal to allow state and local authorities to require wireless service providers to make a "more detailed showing" of compliance with FCC RF exposure limits. Indeed, GTE disagrees with the FCC's premise that requests by state and local authorities for compliance demonstration are reasonable. GTE does not understand why any showing beyond proof of FCC license should be required at any time.

GTE generally agrees with the FCC's proposal that parties challenging state or local action under 332(c)(7)(B)(v) file a petition for declaratory ruling with the FCC. However, the Commission should take steps to ensure that review proceedings are

completed as quickly as possible. In addition, the FCC should limit the parties eligible to participate in review proceedings to the state or local authority and the entity seeking wireless facilities site approval.

GTE supports the Commission proposal to adopt a presumption of RF compliance. The Commission should also allow personal wireless service providers to begin construction of the requested site upon filing for FCC relief. GTE agrees that parties with standing should be given the opportunity to rebut the presumption of compliance. The FCC should take steps, however, both to limit the duration of the review proceeding and to eliminate frivolous claims or participation by parties in order to intentionally delay a facilities site.

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COMMENTS OF GTE SERVICE CORPORATION

GTE Service Corporation and its telephone and wireless subsidiaries hereby file comments in response to the above-captioned *Notice of Proposed Rulemaking*.[1] In the *NPRM*, the Federal Communications Commission ("FCC" or "Commission") proposes procedures for filing and reviewing requests filed pursuant to Section 332(c)(7)(B)(iv)-(v) of the Communications Act ("the Act") for relief from state or local regulations on the placement, construction, or modification of personal wireless service facilities based on the environmental effects of radio frequency ("RF") emissions.[2] In particular, the FCC seeks comments on (1) the definition of certain terms used in the Act; (2) the type of showing a carrier must make to demonstrate compliance with FCC RF emissions rules; (3) the procedures to be followed in requesting FCC relief from state and local

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[1] Procedures for Reviewing Requests for Relief From State and Local Regulations Pursuant to Section 332(c)(7)(B)(v) of the Communications Act of 1934, *Notice of Proposed Rulemaking*, WT Docket No. 97-197 (released August 25, 1997) (hereinafter "*NPRM*").

[2] 47 U.S.C. § 332(c)(7)(B)(iv)-(v).

regulations; (4) whether to adopt a rebuttable presumption that personal wireless facilities comply with FCC RF guidelines; and (5) the procedures and showings that must be made to rebut the presumption of compliance.

GTE supports the FCC efforts to establish a clear set of procedures for entities to follow in requesting relief from state and local facilities siting regulations based on RF concerns. In particular, GTE urges the Commission to treat a failure to approve or reject a wireless facilities siting request within six months as a failure to act, to take steps to prevent state and local authorities from masking based on RF concerns as rejections for some other reason; to adopt, at most, a limited showing requirement for carriers to demonstrate RF compliance; and to adopt a presumption of RF compliance.

I. Discussion

A. Definitions

1. "Final Action" and "Failure to Act"

The FCC proposes in the *NPRM* to define certain terms used in the Act. The Commission proposes to define the term "final action," as used in Section 332(c)(7)(B)(5) of the Act "as final administrative action at the state or local government level." Pursuant to this definition, a party could seek relief from the FCC before all state and local administrative appeals have been exhausted.[3] The FCC, noting Congress' intent not to confer preferential treatment upon the personal wireless service industry, proposes to determine whether there has been a "failure to act" on a case-by-case

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[3] *NPRM* at 57 (¶ 137).

basis. The Commission seeks comment on the average length of time various types of siting permits take to issue.[4]

GTE supports the FCC's proposed definition of final action. Wireless carriers should not be required to exhaust all state or local appeals before pursuing relief at the FCC. GTE also generally supports the Commission's proposal to determine whether a state or local authority has failed to act on a case-by-case basis. GTE believes, however, that the FCC can and should use the record in this proceeding to develop guidelines to establish a time period within which state and local authorities should act on requests for wireless telecommunications facilities sites.

In GTE's experience, the period of time it takes to approve siting requests varies. In the Pacific Northwest, for example, where a plethora of facilities siting moratoria exist, it is not uncommon for requests to take a year or more. Siting approval can also take a year or more if the carrier is required to seek a number of different permits, and if the locality requires that one permit be obtained before applying for another. In other cases and in other locations, facilities siting requests may be approved or rejected in a matter of weeks.

Based on its experience, GTE believes that six months is both an average and a reasonable period of time for state and local authorities to complete action on all of the permits necessary for a personal wireless service provider to begin site construction. GTE therefore urges the Commission to adopt guidelines that require states and localities to complete the approval or rejection process entirely within 6 months or risk

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[4] *Id.* at 57-58 (¶ 138).

FCC intervention and preemption. Failure by a state or local authority either to approve or reject a facilities site within the time guidelines would be evidence that the authority has failed to act.

To the extent that six months represents a faster decision time than may be typical for personal wireless service facilities site actions in an area, GTE does not believe that the FCC would be giving personal wireless services preferential treatment. Because wireless facilities siting issues are often politically sensitive, as evidenced by the moratoria enacted in many places, GTE believes that zoning commissions tend to take longer to act on wireless siting requests than other zoning permit requests. Accordingly, FCC guidelines stating that failure to act within 6 months may constitute failure to act under Section 332(c)(7)(B)(v) would merely ensure that wireless facilities siting requests are treated like other zoning permit requests, not that they be given preferential treatment.

GTE also urges the Commission to find that any moratorium that prevents action on a particular facilities siting request for more than 6 months constitutes a failure to act. In recent comments filed with the Commission, GTE noted that it is not clear whether the FCC has authority to Act under Section 332(c)(7)(B)(v) to preempt wireless facilities siting moratoria based on RF concerns.[5] The uncertainty exists because the FCC has never determined whether moratoria constitute a "failure to act." GTE submits that when a particular moratorium prevents action on a particular request for an

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[5] Federal Preemption of Moratoria Regulation Imposed by State and Local Governments on Siting of Telecommunications Facilities, DA 96-2140, GTE's Comments, filed September 11, 1997.

unreasonable period of time, that moratorium represents a failure to act. Therefore, in order clearly to establish its authority to preempt RF-based moratoria, the Commission should include moratoria in the definition of a "failure to act."

2. "Indirectly"

The Commission states that state and local regulations do not have to be based entirely on RF concerns in order for decisions to be reviewed by the FCC. The Commission notes that the Conference Report accompanying the Telecommunications Act of 1996 stated that such regulations may be based directly or *indirectly* on the environmental effects of RF emissions. The Commission seeks comment on how the term "indirectly" should be defined. The Commission proposes to make determinations regarding whether a regulation is based partly on RF concerns or indirectly on RF concerns on a case-by-case basis.[6] The Commission also tentatively concludes that it has the authority to review state and local regulations that appear to be based on RF concerns but for which no formal justification is provided.[7]

GTE agrees with the FCC's tentative conclusions. GTE believes the FCC must send a clear message to state and local authorities that wireless facilities site actions will be reviewed based not only on the stated grounds for the action, but on the underlying public record – particularly where that record shows substantial opposition based on RF concerns. To prevent state and local authorities from masking decisions based on RF concerns, the Commission must establish several principles: (1) the FCC

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[6] *NPRM* at 58 (¶ 139).

[7] *Id.* at 58-59 (¶¶ 140-141).

will determine whether a decision is based directly or indirectly on RF concerns on a case-by-case basis, considering the entire record of the underlying proceeding; (2) the FCC will review decisions based in part on RF concerns; and (3) the term "indirectly" includes decisions to reject a site authorization request on grounds other than RF, where the underlying record shows that the primary opposition to the site was based upon RF concerns.

B. Demonstration of RF Compliance

The Commission notes that neither the Act nor its legislative history indicates whether and to what extent state and local authorities may request that carriers demonstrate RF compliance. The FCC states that requesting some form of compliance demonstration is reasonable, but that there should be some limit as to the type of information that a state or local authority may seek. The FCC seeks comment on two proposals to demonstrate RF compliance.[8] Under the first, "limited showing" proposal, entities categorically excluded from routine FCC RF evaluation would only be required to certify that the proposed facility will comply with FCC RF guidelines. Other entities may be required to submit to the state or local authority documents related to RF emissions submitted to the FCC as part of licensing process.[9] Under the "more detailed showing" proposal, entities categorically excluded would be required to make a demonstration of compliance.[10] Pending adoption of final rules, the FCC does not

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[8] *Id.* at 60 (¶ 142).

[9] *Id.* at 60 (¶ 143).

[10] *Id.* at 61 (¶ 144). Entities not categorically excluded would be subject to same document production requirement under both tests.

intend to preempt state and local requests for a demonstration in line with the FCC's "more detailed showing proposal."[11]

GTE strongly objects to the Commission's "more detailed showing" proposal, whether as an interim requirement or a final rule. Indeed, GTE disagrees with the FCC's premise that requests by state and local authorities for compliance demonstration are reasonable. GTE does not understand why any showing beyond proof of FCC license should be required at any time. In 1996, the FCC adopted new standards governing RF radiation exposure limits.[12] Section 1.1307(b)(1) of the Commission's Rules requires that the exposure limits set forth in Section 1.1310 are generally applicable to all facilities, operations, and transmitters regulated by the Commission.[13] FCC-licensed personal wireless service providers face serious penalties for noncompliance with FCC rules. For example, for violating FCC rules regarding RF emissions, licensees are subject to forfeiture penalties.[14] In addition, the FCC may the Commission may suspend or revoke the station license,[15] or deny license renewal.[16]

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[11] *Id.* at 62 (¶146).

[12] 47 C.F.R. § 1.1310.

[13] 47 C.F.R. § 1.1307(b)(1). Certain facilities, operations, and transmitters, however, were deemed to present little risk of exceeding RF radiation exposure levels and were excluded from submitting an environmental assessment.

[14] *See* 47 U.S.C. § 503(b); 47 C.F.R. §1.80.

[15] 47 U.S.C. § 303(m)(1)(A).

[16] *See* 47 C.F.R. § 22.940(a)(1)(ii).

Given that FCC rules require compliance with RF exposure limits and that severe and varied penalties may be imposed for noncompliance, compliance with the FCC's RF exposure limits rules is virtually assured. In recognition of the strong likelihood of licensee compliance and in keeping with the FCC practice of presuming compliance with FCC rules, the Commission in this *NPRM* proposes to adopt a presumption of compliance.[17] GTE submits that the same presumption can and should work to satisfy state and local authorities that site applicants will abide by FCC RF emission standards. There is no sustainable reason why state and local authorities should need or require any greater proof of compliance than the FCC itself requires.[18] At most, a state or local authority should be permitted to seek proof of FCC license.

In addition to being unnecessary, allowing state and local authorities to adopt compliance demonstration requirements would require licensees to devote personnel and resources to state and local compliance. Moreover, site approval would likely be delayed until such demonstration can be made and reviewed. Finally, allowing state and local compliance review could lead to situations where state or local authorities disagree with federal authorities regarding whether an entity has indeed complied. Balancing the costs of compliance against the need for state and local review of compliance, it is clear that an additional layer of RF compliance review is completely unwarranted.

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[17] *NPRM* at 64-66.

[18] GTE notes that should state and local authorities want to examine RF compliance documents, FCC station files are generally available for public examination.

Assuming, *arguendo*, that the FCC elects to adopt one of the proposed compliance standards, GTE would prefer the "limited showing" approach, both in the interim and long-term. As noted above, there is no real state and local authority need for compliance demonstration, so carriers should face as limited a requirement as possible. Finally, should the FCC adopt the "more detailed showing," GTE believes that the authority requiring the showing should be required to pay the costs of compliance.

C. Procedures for Reviewing Requests for Relief

The Commission proposes to require parties seeking relief of state and local wireless siting decisions to file petitions for declaratory ruling pursuant to Section 1.2 of the Commission's Rules. The FCC notes that Section 332(c)(7)(B)(v) states that requests for relief may be filed by any person adversely affected. The FCC seeks comment on the meaning of "any person adversely affected." The Commission proposes to define that term narrowly to limit the parties that might file requests for review.[19]

GTE generally agrees with the FCC's proposal that parties challenging state or local action under 332(c)(7)(B)(v) proceed under Section 1.2 of the Commission's Rules. However, GTE is concerned that FCC review proceedings will impose substantial further delays in the facilities site approval process. Typically, petition for declaratory ruling proceedings take a year or more to be completed by the Commission. If FCC review of state and local actions under Section 332(c)(7)(B)(v) takes anywhere near that long, such review will be of little or no use to requesting

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[19] *NPRM* at 63-64 (¶¶ 149-150).

parties. Any facilities site request that reaches the FCC review stage will have already been pending before a state or local body for a significant period of time. Imposing another year or more delay on siting requests will force the requesting party possibly to abandon the request and seek another site (if another is feasible). The delay will also cause wireless providers to expend substantial sums of money and resources pursuing the request and may cause such carriers to lose potential customers. More importantly, further delaying a facilities site will harm the public interest by denying or delaying service into new areas or improvements into existing areas. To prevent these undesirable effects, no matter what procedure the Commission chooses, it must take steps to ensure that review proceedings are completed as quickly as possible.

GTE also agrees that the number of parties allowed to file actions should be limited. GTE believes that the personal wireless service provider is the only party that is adversely affected by a decision to deny a site for RF concerns. Accordingly, only the personal wireless service provider should be deemed to have standing to challenge a state or local decision.

The FCC should also limit the number of parties allowed to participate in the FCC proceeding. GTE believes that the only parties with standing to participate in an FCC proceeding reviewing a state or local facilities siting decision are the party filing the request and the state or local entity acting on the request. Participation by other parties should not be allowed for two reasons. First, the decision to be made by the FCC is largely factual. The only relevant evidence is the decision itself, the record on which that decision was based, and, possibly, evidence that the requesting party actually complies with FCC RF emissions standards. All of this evidence can be presented by

the state or local authority and the petitioner Moreover, the positions of other interested parties will likely already be included in the record below. Second, allowing other parties to participate will likely impose further delays and complications.

D. Presumption of Compliance

The FCC tentatively concludes that it should adopt a rebuttable presumption that personal wireless facilities providers will comply with Commission RF standards. The Commission notes that, generally, the FCC presumes that licensees are in compliance with FCC rules unless presented evidence to the contrary.[20]

GTE strongly supports this proposal. GTE agrees with the FCC that the presumption is consistent with the manner in which the Commission typically operates and with actions taken in other proceedings. Moreover, as discussed above, given the risk of noncompliance, it is highly unlikely that any personal wireless service provider will choose not to comply with the RF exposure limits.

GTE believes the FCC can and should go one step further to reduce delays and speed delivery of service to the public. In particular, GTE believes that consistent with the presumption, personal wireless service providers should be allowed to begin construction of the requested site. Construction would only be allowed upon filing for FCC relief if all other necessary clearances and permits have been obtained and entirely at the risk of the petitioner. If the state or local agency later successfully rebuts the presumption and the site denial is upheld, the petitioner would bear the

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[20] *NPRM* at 64-65 (¶ 151).

responsibility and the cost for removing the facility or bringing the site into compliance with state, local, and FCC requirements.

E. Operation of Presumption

The FCC proposes to allow interested parties to rebut the presumption of compliance. Only interested parties with standing to participate in the proceeding would be able to rebut the presumption. The FCC proposes that to rebut the presumption, a party must show that a particular facility does not in fact comply with FCC RF limits. The FCC suggests three types of evidence that would rebut the presumption: (1) evidence that the personal wireless service provider is not operating with a valid FCC authorization; (2) an environmental assessment showing that the RF limits have been exceeded; or (3) a demonstration that the licensee's operation otherwise does not comply with the RF limits.[21]

GTE agrees that parties with standing should be given the opportunity to rebut the presumption of compliance. GTE urges the FCC, however, to take steps both to limit the duration of the review proceeding and to eliminate frivolous claims or participation by parties in order to intentionally delay a facilities site. Accordingly, GTE asks the Commission to find that the only party with standing to rebut the presumption is the state or local entity that rendered the decision under review. GTE also asks the Commission to consider putting rebuttal evidence through a preliminary review process. If, in the course of such review, the rebutting party fails to submit the type of evidence which, if true, would rebut the presumption, the FCC should summarily render a

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[21] *NPRM* at 66-67 (¶ 153).

decision preempting the state or local action. In this manner, personal wireless service providers can obtain relatively quick relief from frivolous claims of RF noncompliance.

II. Conclusion

GTE supports the FCC efforts to establish a clear set of procedures for entities to follow in requesting relief from state and local facilities siting regulations based on RF concerns. GTE urges the Commission to treat a failure to approve or reject a wireless facilities siting request within six months as a failure to act, to take steps to prevent state and local authorities from masking based on RF concerns as rejections for some other reason; to adopt, at most, a limited showing requirement for carriers to demonstrate RF compliance; and to adopt a presumption of RF compliance.

Respectfully submitted,

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